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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 140

CHRISTOPHER JACKMAN, *et al.*,

*v.*

JOHN M. BODINE, *et al.*

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THE ELIZABETH DAILY JOURNAL, *et al.*,

*v.*

ROBERT J. BURKHARDT, *et al.*

IN THE MATTER OF THE
APPORTIONMENT COMMISSION PLAN FOR 1969

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On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

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## BRIEF OF RESPONDENT ROBERT J. BURKHARDT, SECRETARY OF STATE OF NEW JERSEY IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

**No. 1421**

CHRISTOPHER JACKMAN, *et al.*,

*v.*

JOHN M. BODINE, *et al.*

THE ELIZABETH DAILY JOURNAL, *et al.*,

*v.*

ROBERT J. BURKHARDT, *et al.*

IN THE MATTER OF THE
APPORTIONMENT COMMISSION PLAN FOR 1969

**On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey**

## Counter-Statement of Question Presented

Would the grant of a writ of certiorari be proper under 28 U.S.C. ¶1257(3) where the subject matter of the petition is still pending full hearing and adjudication in a state court proceeding in which petitioners are parties and may obtain complete relief?

## Counter-Statement of the Case

The petitioners herein seek a review of the opinion of the New Jersey Supreme Court in *Jackman, et al.* v. *Bodine, et al.; The Elizabeth Daily Journal, et al.* v. *Burkhardt, et al.* and *In the Matter of the Apportionment Commission Plan for 1969,* 53 N. J. 585 (1969). P.App. pp. 25 to 30.[1] This was the seventh in a series of opinions by the New Jersey Supreme Court in *Jackman* v. *Bodine* since 1964.[2]

Plaintiffs Jackman, *et al.*, were taxpayers and residents of New Jersey who in 1963 filed suit for a declaratory judgment in the New Jersey Superior Court, Chancery Division, seeking to upset New Jersey's then existing plan of state legislative apportionment. At that time the state constitution provided for the allocation of one Senator to each of New Jersey's 21 counties and apportioned 60 Assemblymen among the several counties according to population. Art. IV, Sec. II, par. 1; Sec. III, par. 1, N. J. Const., 1947. Defendant Bodine was the clerk of one of the counties and his co-defendants were four other county clerks, the Secretary of State (Mr.

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[1] References to Petitioners' Appendix will be designated "P.App.". References to Respondent Burkhardt's Appendix will be designated "R.App.".

[2] (1) 43 N. J. 453 (1964);

(2) 43 N. J. 491 (1964);

(3) 44 N. J. 312 (1965);

(4) 44 N. J. 414 (1965);

(5) 49 N. J. 406 (1967);

(6) 50 N. J. 127 (1967);

(7) 53 N. J. 585 (1969).

Burkhardt), the President of the Senate and the Speaker of the General Assembly. In its first *Jackman* v. *Bodine* opinion in November 1964 the New Jersey Supreme Court, armed with the six landmark decisions rendered by this Court in June of that year[3], struck down New Jersey's constitutional apportionment provisions noting that ". . . on their face, [they] do not meet the test of *Reynolds* v. *Sims*." *Jackman* v. *Bodine*, 43 N. J. 453, 459.

Following this decision temporary legislation reapportionment both houses of the New Jersey Legislature was enacted. The New Jersey Supreme Court had, in the interim, found the General Assembly apportionment temporarily acceptable. See *Jackman* v. *Bodine*, 44 N. J. 312 (1965). This temporary legislation established an interim plan for the Senate which allocated 29 Senators among 14 districts composed of one or more whole counties.

An attack on this interim plan was thereafter rejected by the New Jersey Supreme Court. See *Jackman* v. *Bodine*, 44 N. J. 414 (1965). There, the court expressly recognized the propriety of honoring existing county lines in forming legislative districts even though:

> "[O]bviously the districts cannot be of equal population, and the deviations are likely to be larger than those incidental to the creation of original districts indifferent to existing or other political subdivisions." *Id.* at p. 417.

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[3] *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656 (1964); *Davis* v. *Mann*, 377 U. S. 678 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964) and *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713 (1964).

However, in upholding the validity of the legislation as an acceptable transitional step, the court cautioned that it should not necessarily be assumed that it would be considered suitable as a permanent arrangement. In view of legislation then pending (and subsequently enacted) to provide for the calling of a Constitutional Convention to consider the apportionment question in its entirety, the Court refrained from scheduling further argument upon the issue of whether a Convention was the sole vehicle appropriate to devise a permanent plan.

The Convention, whose delegates were duly elected on a bi-partisan basis, met in 1966 and proposed an entirely new constitutional apportionment structure for the State. Essentially, New Jersey was to be divided into 15 Senatorial districts composed of whole counties, to which 40 Senators were allocated. Each Senate district was to be allocated 2 Assemblymen per Senator and the task of drawing boundary lines for the dual member General Assembly sub-districts was assigned to a bi-partisan Apportionment Commission. Art. IV, Sec. II, Pars. 3 and 4; Sec. III, Pars. 1, 2 and 3; Art. IX, Sec. I; Sec. IV, N. J. Const., 1947, as amended. In establishing General Assembly sub-districts the Commission was expressly precluded from dividing a county or municipality unless the failure to do so would result in a sub-district whose population exceeded 1-40th of the total number of inhabitants of the State. Article IV, Sec. II, Par. 3, N. J. Const., 1947 as amended. In practice, this meant that only Newark and Jersey City could be divided between or among more than one sub-district.

In November 1966 the people of the State approved the proposed constitutional amendment at a general election. However, shortly thereafter suit was brought challenging this plan, culminating in the New Jersey

Supreme Court decision in *Jackman* v. *Bodine* and *The Elizabeth Daily Journal* v. *Burkhardt,* 49 N. J. 406 (1967). In that decision the Court ordered certain of the constitutionally established whole county Senate districts to be reconstituted and directed that General Assemblymen be apportioned to the Senate Districts according to the method of equal proportions rather than on the "two to one" basis embodied in the constitutional amendment. In addition, the Court directed the Apportionment Commission to convene prior to the 1969 general election, review all of the General Assembly districts (Senatorial elections in New Jersey are held every four years and thus none was scheduled until 1971) and make a seasonable recertification thereof. See *Jackman* v. *Bodine,* 50 N. J. 127 (1967).

In March 1969 the Apportionment Commission, uncertain as to the precise standards it was expected to apply in recertifying Assembly districts in accordance with the New Jersey Supreme Court's direction, petitioned for instructions. Although the Court eventually dismissed the petition without written opinion it directed the Commission to file its certified plan with the Court as well as the Secretary of State, and gave leave to any person to file objections thereto and be heard.

On April 7, 1969, the Commission certified its General Assembly plan to the Secretary of State and filed a copy with the Court. Several objections against all or parts of the plan were soon filed. Petitioners herein were among the objectors. On April 21, 1969, the New Jersey Supreme Court heard argument on these objections and the following day delivered its decision rejecting all of them. However, noting the substantial state and federal constitutional issues involved, the Court *expressly retained jurisdiction over the cause and declared*

*its intention to schedule full argument for the Fall of 1969.* Said the Court:

> "We do, however, have considerable doubt as to whether the basic plan of apportionment in our State Constitution is compatible with Federal Constitutional requirements as to either the Senate or Assembly. Specifically, we doubt that further apportionments can be made without exceeding permissible tolerances from mathematical equality. *It may therefore, be necessary to depart from the State Constitution's insistence that county and municipal lines be respected. It is perfectly clear that if reapportionment for the State legislative purposes had to be redone without reference to such lines, the practical problems would preclude the scheduled primary election and perhaps also, a general election this year.* We have in mind not only the time period which said reapportionment would entail but also the impact of such reapportionment upon the detailed election machinery. *The scheduled election to the Assembly will be the last before the new census and there will be no election to the Senate prior to that event. Mindful of the need to continue orderly government, we are constrained to conclude that the broad constitutional issue to which we have just referred should not be entertained at this time. We will however schedule the subject for full argument this fall, to the end that the matter may be settled, if possible, well in advance of the 1971 election."* *Jackman* v. *Bodine*, 53 N. J. 585, 588-589. (Emphasis added.)

Thereafter, petitioners herein applied to this Court for a stay of the scheduled June 3, 1969, primary election and for other relief. The application was denied. R. App. p. 1a.

Consistent with its announced intention to call for further argument touching upon the full range of constitutional issues involved in *Jackman* v. *Bodine,* the New Jersey Supreme Court has served notice on all the parties, including petitioners herein, that it would entertain applications to intervene until June 15, 1969, expect briefs to be filed by August 15, 1969, and had set the matter down for oral argument on September 22, 1969. The briefs and oral argument said the Court:

> ". . . shall deal with all questions, including the question whether it is possible to adhere to the following lines without creating intolerable deviation from the one man-one vote concept: (1) county lines, (2) municipal lines, (3) ward lines and (4) election district lines. * * *" R. App. p. 2a.

## *ARGUMENT*

## POINT I

**Since the Supreme Court of New Jersey, in the very opinion which petitioners herein seek to have reviewed, expressly retained jurisdiction in the cause and subsequently implemented its announced intention to schedule full argument on all constitutional questions in the Fall, there exists no final judgment below and the Court therefore lacks jurisdiction pursuant to 28 U.S.C. ¶1257(3) to entertain the petition.**

Nowhere in the argument portion of their petition for the issuance of a writ of *certiorari* to the New Jersey Supreme Court do petitioners discuss the most crucial aspect of that Court's latest opinion. Entirely ignored is the fact that the New Jersey Supreme Court frankly rec-

ognized the actual and potential defects arising from our State Constitution's insistence upon adherence to political subdivision boundary lines and expressly observed that: ". . . we doubt that further apportionments can be made without exceeding permissible tolerances from mathematical equality." *Jackman* v. *Bodine,* 53 N. J. 585, 588. Indeed, said the Court, "It may, therefore, be necessary to depart from the State Constitution's insistence that county and municipal lines be respected." *Id.* Consequently, no final judgment has been rendered by the New Jersey Supreme Court from which a petition for writ of *certiorari* would lie pursuant to 28 U. S. C. 1257(3). To the contrary, jurisdiction has been specifically retained and all counsel informed that full argument on all of the constitutional questions involved will be heard in September 1969. R. App. p. 2a.

The opinion of the Supreme Court of New Jersey specifically dealt with petitioners' contention that adherence to political subdivision boundary lines in *state* districting and apportionment must no longer be tolerated if they give rise to correctable population deviations. The Court preliminarily concluded that the two recent *congressional* districting cases, *Kirkpatrick* v. *Preisler,* —— U. S. ——, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969) and *Wells* v. *Rockefeller,* —— U. S. ——, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969) did not appear at this stage to require such a meaningful departure in the *state* districting context. *Jackman* v. *Bodine, supra,* 53 N. J. 585 at 588.

Interestingly, the decisions of this Court in *Kirkpatrick* v. *Preisler, supra,* and *Wells* v. *Rockefeller, supra,* were delivered on April 7, 1969, the same day the New Jersey Apportionment Commission[4] certified to Secretary of

[4] Petitioners refer to this body as the "Reapportionment Commission". Its correct designation is the "Apportionment Commission".

State Burkhardt the plan of apportionment for the New Jersey General Assembly which petitioners now impugn. Thus, the impact of the *Wells* and *Kirkpatrick* decisions on *congressional* districting were just beginning to be absorbed at the time the New Jersey Supreme Court was called upon to consider the objections to the Apportionment Commission's certified plan. As noted, petitioners herein specifically briefed and argued the impact of *Wells* and *Kirkpatrick* on *state* legislative apportionment, and the New Jersey Supreme Court's decision was undoubtedly the earliest pronouncement by the highest court of any state relative to that question. However, it must be borne in mind that the critical need for a speedy resolution by the Court of the objections presented to it necessitated a drastically curtailed appeal procedure with respect to preparation of briefs and time to prepare for oral argument. Ordinarily, appellants have 30 days within which to file briefs and respondents have 30 days within which to reply. See R.R. 1:7-12. The matter is then scheduled for oral argument some months later. The exigencies of time prohibited use of the ordinary procedure in this case for many reasons. For example, if New Jersey's primary election timetable was to proceed in accordance with the mandate of statutory law, the candidates for General Assembly had only until April 24, 1969, forty days next preceding the date of the primary election, to file their nominating petitions. See N.J.S.A. 19:23-14.

Accordingly, although it gave serious consideration to the *Wells* and *Kirkpatrick* cases, the Court had to be particularly mindful of the time schedule inexorably bearing down upon it. Even though rejecting the argument based upon *Wells* and *Kirkpatrick*, the Court took particular pains to observe that a decision requiring total abandon-

ment of adherence to political subdivision boundaries would, at such a late hour, be potentially disasterous to the orderly conduct of state government. With the primary election scheduled for June, and a general election for November, a decision in April requiring a total revampment of General Assembly districts based upon population *alone* without regard to political subdivision lines would be unthinkable. Such a decision would have automatically foreclosed a June primary and might very well have resulted in *no* election at all in New Jersey in 1969, *primary or general.* See *Reynolds* v. *Sims, supra,* 377 U. S. 533 at p. 585.

Furthermore, there was perhaps a more compelling reason for the Court below not to immediately and finally decide the ramifications of the *Wells* and *Kirkpatrick* issue. The 1969 primary and general elections for candidates for the New Jersey General Assembly were to be the last such elections prior to promulgation of the 1970 federal census figures. Thus, the particular plan of General Assembly apportionment to be used in 1969, indeed *any* plan of apportionment for 1969, by its very nature was only *temporary.* The 15 Senate districts within which the Apportionment Commission established the existing General Assembly subdistricts were based upon 1960 census data. Due to population shifts, entirely new Senate districts are to be established by the Commission in 1971 pursuant to state constitutional mandate. See Art. IV, Sec. III, par. 1, N. J. Const., 1947, as amended. Thus, with a nearly two year hiatus until the next certification of legislative districts, both Senate and General Assembly, the New Jersey Supreme Court felt, and properly so, that ample time existed for a full and detailed exploration of the basic issue of whether and to what extent, if at all, the present districting and apportionment pro-

visions of the New Jersey Constitution could be tolerated under the Federal Constitution. And, as noted *supra*, the Court has served notice upon all the participants in the *Jackman* v. *Bodine* proceeding, including petitioners, that the Court expects to receive briefs by August 15, 1969, and will hear oral argument on September 22, 1969, upon this and all other relevant constitutional questions.

Clearly then, there exists no final judgment below. The constitutional issues presented by petitioners herein are still pending a full and final determination by the New Jersey Supreme Court and a prior adjudication in that latter state forum, which might well be favorable to petitioners and thereby obviate any need for their seeking further relief, must first be obtained. See, *e.g., Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948); *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U. S. 69 (1946); *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120 (1945); *cf. Cardinale* v. *Louisiana*, —— U. S. ——, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969).

Accordingly, since no further state election will be conducted until 1971 petitioners can suffer no possible harm while the Supreme Court of New Jersey is fully considering and deciding the matter. Under the circumstances the contention raised by petitioners respecting New Jersey's state constitutional requirement that Senate and General Assembly districts honor political subdivision boundaries must and should first be fully heard in the New Jersey Supreme Court, the forum where it is presently pending. A grant of *certiorari* now, before the matter has been fully and finally adjudicated by the state court, would be singularly inappropriate.

The foregoing discussion *vis-a-vis* petitioners' Point I applies with equal force to their Point II respecting a

charge of a violation of the Fifteenth Amendment. Other than making unsubstantiated allegations based upon a vague generalized affidavit, there is not, nor has there ever been, a competent record established upon which serious consideration and deliberation of this issue could intelligently proceed. *Cf. Ellis* v. *Dixon,* 349 U. S. 458 (1955); *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947). Further, as observed *supra,* the 1969 *election will in any event proceed upon the districts challenged by petitioners.* By 1971 entirely new districts will have been established by the Apportionment Commission under guidelines emanating from a decision in the pending state court proceeding. It may well be that after the state court fully adjudicates the matter, or after new districts are certified, petitioners may find that they have nothing about which to complain.

## CONCLUSION

**Since the Supreme Court of the State of New Jersey has not fully and finally adjudicated the issues presented in the Petition for Writ of Certiorari, and the state Court has scheduled full argument thereon for September 1969, the petition is palpably premature and should be denied.**

Respectfully submitted,

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State House Annex,
Trenton, New Jersey 08625.

STEPHEN G. WEISS,
Assistant Attorney General,
*Of Counsel and On the Brief.*

# APPENDIX

## Letter of May 26, 1969, from Clerk of the Supreme Court of the United States

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

May 26, 1969

Re: *Jackman, et al.* v. *Bodine, et al.*,
No. 1421, Oct. Term, 1968

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The application for a stay of the primary election of June 3, 1969, and for other relief, is denied. Mr. Justice Brennan took no part in the consideration or decision of this application.

Very truly yours,

JOHN F. DAVIS, Clerk
By: C. T. LYDDEN
Assistant

Hon. Arthur J. Sills
Attorney General of New Jersey
State House Annex
Trenton, N. J. 08625

## Letter of May 14, 1969, from Clerk of the Supreme Court of New Jersey

OFFICE OF THE CLERK
SUPREME COURT OF NEW JERSEY
STATE HOUSE ANNEX
TRENTON, N. J.

JOHN H. GILDEA
CLERK

May 14, 1969

TO COUNSEL IN THE REAPPORTIONMENT CASES

These cases have been set down for further argument on Monday, September 22, 1969, with respect to the constitutionality of the provisions of our State Constitution respecting apportionment.

All briefs shall be filed by August 15th and shall deal with all questions, including the question whether it is possible to adhere to the following lines without creating intolerable deviation from the one man-one vote concept: (1) county lines, (2) municipal lines, (3) ward lines and (4) election district lines. Applications to intervene shall be filed with the Court not later than June 15, 1969.

JOHN H. GILDEA